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SUPREME COURT, U.S.

NO. 81-6385

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

IGNACIO ALBERTO ORTIZ

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Petitioner,

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STATE OF ARIZONA,

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WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Since the Arizona Supreme Court has consistently given the same definitions for "cruel," "heinous," and "depraved," and has not hesitated to disagree with the trial courts when the latter have erroneously applied those definitions, has petitioner shown that the language of that particular aggravating circumstance has been applied to him in an overbroad or vague manner?

2. Did imposition of the death penalty in petitioner's case, after a full and independent review of aggravation and mitigation by the Arizona Supreme Court, violate due process?

3. When the statute requires imposition of the death penalty if the trial court finds even one aggravating circumstance, and there is nothing to balance because neither the trial court nor the Arizona Supreme Court found proffered mitigation sufficient to merit leniency, does it violate due process for the Arizona Supreme Court not to remand the case for resentencing?

STATEMENT OF THE CASE

Although Charles McCormack, Jr., and his wife experience marital difficulties in 1977-78, they reconciled in the fall of 1978. When they were having problems, Manuelita McCormack consulted an attorney about divorce proceedings. (R.T., Vol. 4, at 167-68.) Petitioner accompanied her on some of these occasions. (R.T., Vol. 3, at 167-61.) Two months before her murder, however, Manuelita McCormack reconciled with her husband and was happy. (R.T., Vol. 5, at 67.) Around Labor Day, 1978, she told petitioner not to call her anymore. (Id. at 126.) Only a week before her death, the victim asked her sister, Rosemary Valdez, to call and say that Rosemary's baby was sick. Manuelita anticipated a visit from petitioner and wished to avoid him by having to take her sister and niece to the doctor. (Id. at 70.) During the period when the victim was separated from her husband, petitioner offered to have her husband murdered. (Id. at 165.)

The night of December 21, 1978, petitioner murdered Manuelita McCormack, stabbed her two young daughters, set fire to the house to conceal his crimes, and left three children, including his own infant godson, in the burning house. Indeed, petitioner told Bernice McCormack to stay in the home until the firemen arrived.

Petitioner was indicted for murder, attempted murder, aggravated assault, arson, and burglary on December 29, 1978. While incarcerated in the Pima County Jail, petitioner told Jose Alvarez details of the murder. He also offered Alvarez $10,000 to murder six people, including the three children who had seen him murder their mother. Alvarez had a friend contact the Pima County prosecutor. Petitioner and his wife, Mary Frances Ortiz,

were subsequently charged with conspiracy to commit murder. Petitioner obtained a severance on the conspiracy charge and had that consolidated with the other pending offenses. The following is a summary of the most significant portions of the testimony at the trial in June, 1979.

Nine-year-old Patricia identified petitioner as "Nacho," Baby Charlie's godfather. (R.T., Vol. 2, at 107.) She had seen him come to visit her mother when her father was at work. (Id. at 110.) On December 21, 1978, the night of the murder, Patricia, Bernice, and Baby Charlie went to bed in Patricia's bedroom around 9 o'clock. (Id. at 116.) Bernice awoke Patricia to tell her that Baby Charlie wanted a glass of water. Having given Baby Charlie a glass of water, Bernice returned to the bedroom and informed Patricia that their mother was bleeding and that she had seen Nacho. (Id. at 127.) Afterwards, petitioner entered the children's bedroom and told them that he was going to call an ambulance for their mother. (Id. at 128.) The children played with clay, and the ambulance never arrived. (Id. at 130.)

Eventually, petitioner went into Patricia's bedroom and told her that her mother was asking for her. (Id. at 131.) When Patricia went into the living room, petitioner grabbed her from behind and stabbed her twice in the chest. (Id. at 134.) Patricia testified that she had seen the knife before, and that petitioner carried it in a sheath on his belt. (Id. at 135-37.) Patricia ran into her mother's bedroom and collapsed on the bed. She saw petitioner stab her younger sister, Bernice, when Bernice entered the bedroom. (Id. at 139.) Patricia testified that, after the stabbings, she heard a sloshing sound

reminiscent of liquid in a container and smelled gasoline. (Id. at 143-45.) After petitioner set fire to the house, Patricia managed to reach the sidewalk in front of the house, where she collapsed, bleeding and vomiting. (R.T., Vol. 3, at 66.) Dr. William Berkely testified that Patricia had no discernible blood pressure when she was brought to the hospital. One of the wounds inflicted by petitioner severed a major chest artery, and Patricia would have bled to death within 30 minutes if help had not been immediately available. (R.T., Vol. 5, at 15-27.) When paramedic Sherman Crawford reached Patricia McCormack, her skin was cold and she had no diastolic blood pressure. Patricia told Crawford that "Nacho" had stabbed her. (R.T., Vol. 4, at 103-04.) Bernice told Peter Jorgensen, another paramedic, that Nacho stabbed her with a hunting knife. More important, however, was Bernice's statement that petitioner placed her on the bed and told her to stay there until the fire department arrived. (Id. at 140-41.) The house was totally enveloped in flames when the first fire trucks arrived about 12:56 a.m. (Id. at 9-10, 60.) If Bernice had waited, as petitioner advised her to do, the children would have burned to death.

Firemen discovered a pile of clothing at the foot of the bed in Patricia's bedroom. On top of this clothing was a matchbook-cigarette time delay ignition device. (R.T., Vol. 6, at 16-17.) An F.B.I. fingerprint expert testified that two fingerprints lifted from the matchbook were those of petitioner's left index finger. (R.T., Vol. 7, at 35.)

While in Pima County Jail awaiting trial on charges of first degree murder, attempted murder, aggravated assault, arson, and burglary, petitioner struck up an acquaintance with Jose Alvarez and eventually became Alvarez's

cellmate. Alvarez was awaiting trial on multiple counts of armed robbery. According to Alvarez, petitioner asked to move in as his cellmate at the end of January 1979. Petitioner told Alvarez that he had killed his "comadre" at her house with a knife. (R.T., Vol. 7, at 142-45.) They talked about petitioner's case virtually every night until Alvarez entered Kino Hospital for knee surgery. Alvarez's testimony presented details of the killing that only the murderer could have made known to him. Petitioner told Alvarez that he parked his truck behind the McCormack residence, went in, and stabbed Manuelita McCormack in the chest with a hunting knife he was carrying. (Id. at 146-47.) He further related that he stabbed the two girls and told them to lie down (as Bernice McCormack had told a neighbor). (Id. at 148.) Moreover, he told Alvarez that he set the house on fire with gasoline from a container he had in his truck, and gave Alvarez details of the matchbook time-delay device that firemen found at the scene. (Id. at 149.) In addition, petitioner told Alvarez that police had found the knife and gasoline container at his home. (Id. at 156-57.) He indicated that he had cleaned the knife, but a little blood remained on it. (Id.) Before Alvarez went to Kino Hospital in late February, 1979, petitioner offered him $10,000 to kill six people. The proposed targets were the three McCormack children, Rosemary Valdez (the victim's sister), the vicitim's husband, and Diane Wilson, an acquaintance of the victim's husband. (Id. at 164-66.) Petitioner wanted the victim's husband and Diane Wilson killed first because he feared reprisal from the husband if the children were killed first. He also suggested that, if Patricia McCormack was still hospitalized when Alvarez was released, that Alvarez could

sneak into her room and inject heroin into her I.V. (Id. at 164-67, 180.) Petitioner repeatedly drew maps to show Alvarez where the children were living and going to school, was well as directions to the home of petitioner's mother-in-law. (Id. at 169-70.) The plan was as follows: Alvarez was to have someone obtain guns and place them in a bus depot locker. Petitioner's wife was to visit Alvarez in Kino Hospital to pick up the key to the locker. Mary Ortiz would then collect the guns from the locker and transport them to her mother's home. When Alvarez was released from the hospital, he was supposed to drive to the home of petitioner's mother-in-law at night, flash his lights one time, and wait for the mother-in-law to deposit the guns in the mailbox. (Id. at 170, 172-73.) Petitioner also told Alvarez that his wife had followed the children and the victim's husband, Charles McCormack, Jr. (Id. at 174-77.) Just before Alvarez went into the hospital, petitioner told him to arrange for the guns and petitioner would have someone else kill the six people. (Id. at 186.)

The jury convicted petitioner of all charges. After an aggravation-mitigation hearing, the trial court, having found three statutory aggravating circumstances and no mitigation substantial enough to call for leniency, imposed the death penalty. Petitioner appealed, raising seven major issues, including the ones presented to this Court. The Arizona Supreme Court affirmed the convictions and upheld the death penalty. State v. Ortiz, No. 4818 (Ariz.Sup.Ct., Nov. 23, 1981). The supreme court denied rehearing January 12, 1982.

ARGUMENT

I

THE PARTICULAR AGGRAVATING CIRCUMSTANCE ATTACKED BY PETITIONER HAS NOT BEEN INTERPRETED IN THREE DIFFERENT WAYS, AND IS NOT OVERBROAD OR VAGUE; ARIZONA'S DEATH PENALTY DOES NOT VIOLATE DUE PROCESS.

Employing a scattergun approach and making extremely careless representations about the law in Arizona, petitioner alleges that the interpretation of one particular circumstance is unconstitutionally overbroad, that failure to specify with exactness what constitutes mitigation and alleged failure to provide effective appellate review of death penalty cases, amounts to violation of due process. None of these contentions has merit.

A. The Arizona Supreme Court has consistently defined "cruel," "heinous," and "depraved" in the same manner.

Petitioner misleads this Court when he says that the Arizona Supreme Court has given three different interpretations to the aggravating circumstance of especially cruel, heinous, or depraved embodied in Ariz.Rev.Stat.Ann. § 13-703(F)(6). The Arizona Supreme Court has, over the years, clearly and repeatedly stated the same definitions for these terms. The Arizona Supreme Court has not given three different interpretations to one term, but a separate definition to each adjective within a circumstance that the legislature has written in the disjunctive. It is apparent that this is petitioner's real disagreement when he argues, in essence, that Arizona has to write a statute the same way other states do, and, by implication, interpret it the same way. Petitioner cites no authority for the proposition that a state has to use the same terminology as another state, or that a state may

not constitutionally write an aggravating circumstance in the disjunctive.

Appellant's citation to Godfrey v. Georgia, 446 U.S. 420 (1980), is inapposite. In the first place, the Georgia Supreme Court dealt with a statute significantly different from the Arizona statute and, until Godfrey, had given the statutory language a restricted meaning. Georgia Code Ann. § 27-2534.1(b)(7) states, in pertinent part, that the penalty of death may be inflicted if the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This Court had previously ruled that this language was not unconstitutional on its face. Gregg v. Georgia, 428 U.S. 153 (1976). This Court also expressed its belief that the Georgia Supreme Court would not adopt an unconstitutionally broad interpretation of the (b)(7) language. 428 U.S. at 201. In death penalty cases, the Georgia Supreme Court evolved a restrictive definition of this particular aggravating circumstance and made it clear that the (b)(7) language would not be applied in an overly broad fashion:

> Under our duty specified in Code Ann. § 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a "catch all" for cases simply because no other statutory aggravating circumstance is raised by the evidence.
>
> . . . .
>
> We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhumane. Each of the cases is at the core and not the periphery, and we intend to restrict our approval of the death penalty under this statutory

aggravating circumstance to those cases that lie at the core.

Harris v. State, 237 Ga. 718, 732-33, 230 S.E.2d [illegible], 10-11 (1976) (emphasis added). In a later case, the Georgia Supreme Court held that torture and aggravated battery both require infliction of serious physical injury upon the victim before death. Blake v. State, 239 Ga. 292, 299, 236 S.E.2d 637, 643 (1977). In addition, the opinion in Blake equated "depravity of mind" with the infliction of torture or aggravated battery upon the victim before death. (Id.) In short, the outrageousnes or vileness of the act depended upon the depravity of mind, which -- in turn -- had to manifest itself in the form of serious physical injury upon a live victim either by torture or aggravated battery. Consequently, the Georgia Supreme Court had not affirmed the death penalty under a (b)(7) finding unless there was evidence of physical abuse to the victim before death.

In Godfrey, however, the jury simply found that the murders were "outrageously or wantonly vile, horrible and inhuman." Godfrey killed his wife and mother-in-law with shotgun blasts to the head. The state conceded that they died instantly and that no torture was involved. In his sentencing report, the trial judge stated that the murders did not involve torture. This Court reversed the death sentence: "The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme court itself in the Harris and Blake cases." 446 U.S. at 432. That holding makes clear that this Court reversed because of Georgia's failure to consistently apply its own definition, not because that definition was unconstitutional. Indeed, by referring to the definition evolved in the Harris and Blake cases, this Court tacitly

recognized the legitimate power of the Georgia Supreme Court to develop its own definition. There is absolutely nothing in Godfrey supporting the proposition that states cannot constitutionally define terms such as "heinous" or "depraved." Nor is there anything in that opinion holding that every state must define such language in precisely the same manner.

The Arizona Supreme Court has consistently defined "cruel," "heinous," and "depraved" as follows:

> The words "heinous, cruel or depraved" have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:
>
> > heinous: hatefully or shockingly evil: grossly bad.
> >
> > cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.
> >
> > depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978). See also State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979); State v. Ceja, 115 Ariz. 413, 416, 565 P.2d 1274, 1277 (1977).

This Court has clearly held that state courts are the ultimate expositors of state law. Mullaney v. Wilbur, 421 U.S. 684 (1975); Murdock v. City of Memphis, 20 Wall. 590 (1875). Unless one can show infringement of federal constitutional rights, federal courts are bound by the interpretation the highest state court places upon state statutes. Williams v. Baker, 399 F.2d 681 (10th Cir. 1968); Miller v. Crouse, 346 F.2d 301 (10th Cir. 1965); Olson v. Tahash, 344 F.2d 139 (8th Cir.), cert. denied, 382

U.S. 858 (1965); United States ex rel. Scott v. Babb, 199 F.2d 804 (7th Cir. 1952), cert. denied, 344 U.S. 935 (1953). The Arizona Supreme Court has also repeatedly pointed out that "cruel" pertains to the deliberate infliction of physical pain or mental anguish upon the victims, while "heinous" and "depraved" refers to the killer's state of mind at and near the time of his murders as reflected in his words and actions. State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980); State v. Lujan, supra. Since the statute is written in the disjunctive, the aggravating circumstance will be sustained if there is evidence beyond a reasonable doubt to support a finding of any one of those elements. State v. Clark, 126 Ariz. 428, 436, 616 P.2d 888, 896, cert. denied, 449 U.S. 1067 (1980); State v. Ceja, supra. In determining whether the murderer's actions reflect an especially "heinous" or "depraved" state of mind, the Arizona Supreme Court considers the totality of the circumstances -- as in petitioner's case -- not just the actual act of killing. State v. Ceja, supra. Thus, it is clear that the Arizona Supreme Court, having defined the three terms, has not changed the definitions, but considers each case to determine whether any one, or all three, may be present. Appellant's real objection is that the Arizona Supreme Court sustains the finding if any one of the elements exists; petitioner implies that it is somehow constitutionally impermissible to do so, without citing authority to that effect. Obviously, the legislature could have achieved exactly the same result by placing each of the terms in a separate aggravating circumstance instead of writing one circumstance in the disjunctive. The result would have been precisely the same -- aggravation would exist if the evidence supported the finding of any one element.

Petitioner's argument that Ariz.Rev.Stat.Ann. § 13-703(F)(6) is unconstitutional because it fails to require proof of torture or an aggravated battery is nonsensical. Again, there is nothing in Godfrey, supra, or the Constitution that requires a state to phrase or interpret an aggravating circumstance precisely as another state has done. Some states have more, and different, aggravating circumstances than Arizona. Does that render their statutes unconstitutional? Moreover, petitioner is wrong when he asserts that every state has interpreted similar terms to require torture and aggravated battery. Florida has plainly interpreted cruelty, as has Arizona, to include mental anguish as well as physical pain. Francois v. State, 407 S.2d 885, 890 (Fla. 1981) (finding of cruelty appropriate where successive victims suffered mental anguish hearing gunshots that killed first victim and realizing that their fate was sealed); Washington v. State, 362 S.2d 658, 665 (Fla. 1978), cert. denied, 441 U.S. 937 (1979) (especially cruel and artrocious where victim was tied spread-eagle on bed, helpless, and stabbed a day later; mental anguish awaiting death); Knight v. State, 338 S.2d 201, 202 (Fla. 1976) (husband and wife suffered prolonged mental anguish by being kidnapped and becoming increasingly aware of their imminent murders). Proof of the fact that the Arizona Supreme Court carefully distinguishes "cruel" from "heinous" and "depraved" may be seen in a series of cases in which the court, finding neither deliberate infliction of physical suffering nor mental anguish, refused to find the element of cruelty. State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980) (although defendant repeatedly struck victim in head with claw hammer, medical testimony established that victim

did not feel successive blows, therefore precluding the finding of cruelty; the killing was, however, committed in an especially heinous and depraved manner when viewed in the totality of the defendant's acts and words, including his dragging the victim to a mine shaft, throwing the still twitching body into it, covering the body with rocks, and saying, "Good-bye Norman, I hope we never see you again."); State v. Clark, supra (not cruel because of lack of proof of physical suffering or mental anguish preceding death; especially depraved, however, because the defendant killed four people, two of whom had given him a job and a place to stay, and a teenager who had tried to befriend him); State v. Ceja, supra (not cruel because multiple gunshot wounds caused instantaneous death; but especially heinous and depraved because defendant, having killed both victims, continued pumping shots into their bodies, and kicked one victim repeatedly about the face.) Petitioner also fails to point out that the Arizona Supreme Court did not agree with the trial court that the murder petitioner committed was especially cruel, but did agree that it was especially heinous and depraved. Slip opinion at 33. That holding is perfectly consistent with the cases discussed above because the state did not prove, in petitioner's case, that the victim endured physical suffering or mental anguish preceding her death by multiple stab wounds.

Petitioner makes a distinction without a difference when he states that the trial court in State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980), found the murders to be especially heinous while the trial court before whom Steelman's codefendant, Douglas Gretzler, was tried, did not find that Gretzler committed the murders in an especially heinous fashion. Petitioner does not inform

this Court that the distinction is academic since both Steelman and Gretzler received the death penalty. That result was hardly surprising since both had previously been convicted of nine murders in California.

In summarizing, respondent points out that petitioner's entire argument is based on a distorted interpretation of Arizona cases, that Arizona has separately defined each of three terms within an aggravating circumstance that the legislature chose to write in the disjunctive, and that nothing in the Constitution or any decision of this Court forbids framing an aggravating circumstance in the disjunctive or requires that every state interpret terms precisely as every other state. Since Arizona has given distinct definitions and consistently applied them, the Constitution is not offended, and the inconsistent application, not definition, that was present in Godfrey v. Georgia, supra, has not been shown.

B. Lack of definition about what constitutes sufficient mitigation to merit leniency.

Although petitioner knows that this argument is without merit and has already been decided by this Court, he contends that the death penalty is invalid because the Arizona Supreme Court has never defined what constitutes mitigation sufficiently substantial to warrant leniency. The proposition is so inherently absurd that it hardly merits response. This Court mandated open-ended presentation of possible mitigating factors precisely so that a defendant could present anything in an attempt to establish mitigation. Lockett v. Ohio, 438 U.S. 586 (1978). Moreover, this Court has already ruled that the death penalty may be constitutionally imposed provided that the sentencer's decision is channeled and guided by specific factors that weigh for or against the penalty:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258 (1976). No one could ever devise a list of aggravating or mitigating factors that would meet with universal approval. The moment someone compiled a list of mitigation and attempted to assign specific weights to each circumstance, defendants would raise another hue and cry disagreeing with the factors listed and/or their respective weights. This Court has never required intransient, specifically weighted standards to be applied in mitigation. Indeed, such a task would be impossible precisely because of the virtually infinite combinations of circumstances accompanying crimes and the varying backgrounds, and possible prior criminal records, of individual defendants. It is apparent that there can be no absolutely fixed list of mitigating factors. In addition, the process is more than a mechanical tallying of mitigation against aggravation. The Arizona Supreme Court and other courts has made it clear that the quality of the particular circumstance, as well as the total number of each kind, ultimately determines whether the death penalty shall be imposed. State v. Brookover, 124 Ariz. 38, 601 P.2d 132 (1979); State v. Knapp, 125 Ariz. 503, 504, 611 P.2d 90, 91 (1980). Other states have reached this same logical conclusion. Hargrave v. State, 366 S.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). In noting that Knapp received the death

penalty but Brookover did not, even though the Arizona Supreme Court found one aggravating and one mitigating circumstance in each case, petitioner conveniently omits mentioning the nature and quality of the mitigation. Knapp burned his two small daughters to death by setting fire to their bedroom. The only mitigating factor was his lack of a prior criminal record. Brookover had a prior conviction for possession of marijuana; medical testimony, however, established that he suffered from a neurological lesion. Although the trial court did not find this substantial enough to warrant leniency, the Arizona Supreme Court, in its independent review and weighing of aggravation and mitigation, found that this neurological problem was a major cause of Brookover's behavior and thus constituted sufficient mitigation to reduce the sentence to life. 124 Ariz. at 42, 601 P.2d at 1326.

C. Appeals in death penalty cases are automatic in Arizona. The Arizona Supreme Court independently reviews the trial court's findings of aggravation and mitigation, and independently determines whether death has been properly imposed.

Petitioner contends that the Arizona Supreme Court does not perform a constitutionally acceptable proportionality review involving all death penalty cases. Apparently, petitioner has been reading cases different from those respondent reads because it is clear from all death penalty cases, including petitioner's, that the Arizona Supreme Court takes very seriously the obligation to ensure that the death penalty is not arbitrarily imposed, and does compare each case to other cases. State v. Ortiz, supra (slip op. at 24-25). Appeals in death penalty cases are automatic in Arizona and go directly to the supreme court. Rule 31.2(b), Arizona Rules of Criminal Procedure; Ariz.Rev.Stat.Ann. § 13-4031. By statute, the supreme

court must search the entire record for fundamental error. Ariz.Rev.Stat.Ann. § 13-4035. In describing the keen sense of duty it feels when reviewing these cases, the Arizona Supreme Court said:

> The question before us is not whether the trial court properly imposed the death penalty, but whether, based upon the record before us, we believe that the death penalty should be imposed. A finding merely that the imposition of the death penalty by the trial court was "factually supported" or "justified by the evidence" is not the separate and independent judgment by this court that the death penalty warrants. This is in keeping with the mandate of the United States Supreme Court that we must review carefully and with consistency death penalty cases and not engage in a "cursory" or "rubber stamp" type of review. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).
>
> The death penalty statute must not be applied freakishly or unevenly. We review each and every death penalty imposed in the State of Arizona, and not only are we in a position to insure that, based upon all the records that come before us, the death penalty is evenly enforced on appeal, but also that it is not inflicted in an arbitrary and capricious manner. As was stated by the United States Supreme Court:
>
> > "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859, 883 (1976).
>
> And:
>
> > "This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. * * *." Godfrey v. Georgia, 446 U.S. 420, 428, 100

S.Ct. 1759, 1764, 64 L.Ed.2d 398, 406 (1980).

State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981). The Arizona Supreme Court has not hesitated to disagree with the trial court's finding of aggravation or, in its independent assessment of aggravation and mitigation, to determine that migitation may be substantial enough to call for leniency. State v. Watson, supra (reduced to life because of model prisoner mitigation and attempts to obtain education); State v. Lujan, supra (supreme court disagreed with trial court's finding of aggravation and reduced sentence to life); State v. Brookover, supra (neurological lesion found to be major causative factor in defendant's actions sufficient to reduce sentence to life). This argument has no merit.

II

IMPOSITION OF THE DEATH PENALTY IN PETITIONER'S CASE IS AMPLY SUSTAINED BY THE EVIDENCE AND DOES NOT VIOLATE DUE PROCESS OR CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

A. The Arizona Supreme Court properly found that the prosecution gave petitioner sufficient notice about the particular circumstances and evidence upon which it would rely to prove aggravation.

Citing a case that involved absolutely no information about the nature of charges against a juvenile, petitioner fallaciously analogizes the notice he received to that received by the parents in In Re Gault, 387 U.S. 1 (1967). In that case, as this Court is well aware, the parents of a juvenile against whom delinquency proceedings had been instituted received notice of nothing but the date of the proceedings. That is not what happened in petitioner's case, and that is also the reason that he merely makes the assertion without demonstrating precisely what it was that supposedly surprised or prejudiced him. The Arizona

Supreme Court correctly held that the state provided petitioner ample notice of the circumstances it would seek to prove and the evidence upon which it would rely far enough in advance of the aggravation-mitigation hearing to allow defense counsel to prepare. State v. Ortiz, supra, at 26-27.) The state filed a 12-page memorandum September 10, 1979, disclosing its intention to rely on the circumstances of Ariz.Rev.Stat.Ann. § 13-703(F)(3) and (6). The state submitted an additional memorandum September 12, and a third memorandum October 2, which stated that the prosecutor would also seek aggravation under Ariz.Rev.Stat.Ann. § 13-703(F)(1). (Appendix.) Moreover, defense counsel filed a 6-page reply to those memoranda. That memorandum, which includes a point-by-point refutation of the factual basis upon which the state intended to rely to establish the existence of the circumstances in Ariz.Rev.Stat.Ann. § 13-703(F)(3) and (6), makes it perfectly plain that defense counsel knew exactly what the state would try to show; otherwise, he could not have responded in detail. (Appendix.) As the Arizona Supreme Court notes in the opinion, the statute provides that all evidence admitted at trial that may bear upon aggravation or mitigation "shall be considered" without having to reintroduce it at the sentencing hearing. Ariz.Rev.Stat.Ann. § 13-703(C). Thus, petitioner was clearly on notice that the state would seek to prove three aggravating circumstances based upon any evidence adduced at trial, and, in particular, that evidence discussed in the three memoranda submitted by the state. It is ludicrous to assert that one who sat through the entire trial and heard every detail (which he already knew) could not possibly imagine what evidence the prosecution

would use to prove aggravation. That, of course, was not the situation in Gault, supra. Moreover, petitioner never says what surprised him or what he could possibly have done to rebut anything presented. The record is clear that petitioner was fully advised of the aggravating circumstances the state would attempt to prove in advance of the sentencing hearing.

B. Petitioner was not denied any Sixth Amendment right to confront his wife because this Court has never held that all due process rights apply to sentencings, and petitioner could not have rebutted the evidence because he had admitted to two doctors, one of them a defense witness, that he had beaten his wife and had extramartial affairs.

Petitioner correctly recognizes, as did the Arizona Supreme Court, that this Court has never held that the full panoply of procedural due process rights available to a defendant prior to and during trial are equally mandated at a sentencing hearing. Williams v. New York, 337 U.S. 241 (1949). Neither does Gardner v. Florida, 430 U.S. 339 (1977), lend support to petitioner's claims on the specific facts of this case. In Gardner the jury had found some aggravation but mitigation sufficient to render an advisory opinion recommending life imprisonment. The trial court, however, after considering a presentence report that it did not fully disclose to either counsel, stated that it was imposing the death penalty because there was aggravation and no mitigation. The trial court made it clear that it was doing so, at least in part, in reliance on information in the presentence report. Thus, that case involved a failure to disclose information to the state or defense counsel. This Court found that procedure did violate due process. However, in stating in general terms that sentencing procedures had to comply with due process, Justice Stevens inserted a familiar caveat:

> The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.
>
> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrissey v. Brewer, 408 U.S. 471, 481.

430 U.S. at 358 n.9. It is quite clear, therefore, that "due process" retains much of the amorphous and chameleon-like quality that has long characterized this pragmatic concept, and does not, on the facts of this case, mandate a finding that a defendant has a Sixth Amendment right to cross-examine a witness whose testimony the state offered, not in aggravation to enhance punishment, but a rebuttal to petitioner's proffer of mitigation. This is particulary true in light of the fact, nowhere mentioned by petitioner, that he admitted to Dr. Ginnetti that he had engaged in numerous extramarital affairs and beaten his wife, and admitted to Dr. Gurland that he had beaten his wife. (R.T. of Oct. 4, 1979, at 12-13; Dr. Ginnetti's evaluation of July 18, 1979, at 3.) How was petitioner going to surrebut what he had told his own expert witness? The Court will note that petitioner does not allege that he could have produced any surrebuttal, or that he did not relate that information to the doctors. The last case upon which petitioner relies, Specht v. Patterson, 386 U.S. 605 (1967), is easily distinguishable from the case sub judice. This Court first reiterated that it adhered to its

earlier holding in Williams v. New York, supra. Having reaffirmed its holding in Williams, this Court indicated that the case before it evolved within a radically different context. Specht was charged and convicted under a statute that provided for a maximum penalty of 10 years. He was sentenced, however, not under the statute under which he was convicted, but under Colorado's Sex Offenders Act, which allowed an indeterminate sentence of 1 day to life if the offender was found to constitute a menace to society, or to be an habitual offender and mentally ill. The requisite psychiatric evaluation was performed, and a report forwarded to the trial court. Specht's counsel, however, did not receive a copy of the report, and did not have the chance to cross-examine the psychiatrist. The Court said:

> [T]he invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment.

386 U.S. at 610 (emphasis added, citation omitted). Thus, Specht was subjected to a totally different range of penalties -- not limited to the 10 years in the statute under which he was convicted -- and given no hearing at all. That obviously is not the case before this Court.

The Arizona Supreme Court correctly decided that the Sixth Amendment right to confrontation has never expressly been held to apply to sentencings, as opposed to trials. In addition, petitioner did not argue on appeal, and does not argue here, that he could have produced any mitigation from cross-examining his wife, nor does he argue that he could have rebutted what the state offered in rebuttal to his mitigation. It is patent that he could not have because, as respondent has pointed out, petitioner admitted to two doctors that he was an adulterer and had beaten his wife.

C. The trial court did not consider any non-statutory aggravating circumstances.

Because the trial court did not find mitigation, petitioner maintains that the trial court actually used the fact that he was a liar, adulterer, and wife-beater as non-statutory aggravating factors. The trial court simply stated the some factors it might ordinarily have considered mitigation were offset by rebuttal in the form previously mentioned. That special verdict also indicates that petitioner's proffered mitigation was considerably weakened by the fact, specifically mentioned twice in the special verdict, that he spent the first three months in jail conspiring to murder the child-witnesses against him. (Petitioner's Appendix III, at 5.) The jury determined that petitioner was a liar when it convicted him of all charges. Since petitioner admitted to Drs. Ginnetti and Gurland that he was an adulterer and wife-beater, there is little point in protesting the existence of that information at this late date. Moreover, even if the trial court found everything petitioner offered as mitigation, it would still have had to weigh whether that was substantial enough to call for leniency in view of the aggravation proven. Finally, in its independent review of the entire record, the Arizona Supreme Court agreed with the trial court that whatever mitigation petitioner had offered, "it was not sufficiently substantial to call for leniency." Slip opinion, at 35. In essence, petitioner argues that the state may not produce, and the trial court may not consider, rebuttal to mitigation. However, Ariz.Rev.Stat.Ann. § 13-703(C) specially allows either party to rebut evidence presented by the other. Petitioner is of the opinion that all evidence offered in rebuttal to

mitigation is actually aggravation in disguise. Such "aggravation," of course, could not be used under the specifically restricted list of aggravating factors in Ariz.Rev.Stat.Ann. § 13-703(F) and was not so used in this case.

D. Since the Arizona Supreme Court had never considered a case with a similar factual predicate, it did not depart from precedent in finding that petitioner created a grave risk of death to others during the commission of the offense.

Attempting to have this Court agree with him about a premise upon which he could not persuade the Arizona Supreme Court, petitioner argues that the Arizona Supreme Court "deviated from established precedent"when it considered that total chain of his actions in murdering Manuelita McCormack and setting fire to the house, with the three small children in it, in an attempt to cover his tracks. Respondent notes that petitioner does not allege that the circumstances of the two cases he cites are similar to those of his case. They are not. Petitioner unsuccessfully attempted to convince the Arizona Supreme Court to artifically compartmentalize his continuing chain of actions so that it would consider only the actual stab wounds as he inflicted them upon the victim. This the supreme court refused to do. Noting that the concealment of the murder was intimately bound up with the murder, the Arizona Supreme Court held that in setting fire to the house, after stabbing Patricia and Bernice and telling them to wait for the firemen, petitioner created a grave risk of death to others. Slip opinion, at 31. That conclusion could not have been more logical. It is true that in neither Clark, supra, nor Ceja, supra, did the Arizona Supreme Court find this particular circumstance. The reason is that the defendants in both those cases intended to, and did, kill everyone present at the scene. In addition, there was no

evidence that while Clark and Ceja were shooting, any other person who was not later deliberately murdered, was in a zone of danger, e.g., in the path of errant bullets. It is equally clear, that neither Clark nor Ceja stabbed two small girls, told them and their 3-year-old brother (petitioner's godson in this case) to stay in the house until the firemen arrived, and then set fire in several locations throughout the house using trailers to increase the conflagration. Contrary to petitioner's assertion, the Arizona Supreme Court had never previously interpreted the phrase "in the commission of the offense" in Ariz.Rev.Stat.Ann. § 13-703(F)(3) to be limited to only those acts that immediately produce the death of a victim. The decisions mentioned by petitioner merely held that, on the particular facts of those cases, the defendants did not endanger others by the actual act of firing a gun; those cases did not hold that "in the commission of the offense" was rigidly limited to the immediate death-producing act and could not encompass a deliberate arson calculated to conceal a murder that had immediatey preceded it. See also King v. State, 407 S.2d 904 (Fla. 1981) (Florida Supreme Court upheld trial court's finding that, in the commission of the offense, the defendant created a great risk of danger to many others by committing arson after he had raped and killed an elderly lady, thus endangering fireman and others who might attempt to extinguish the blaze and rescue the victim.)

Similarly, petitioner errs in his assertion that the Arizona Supreme Court deviated from previous holdings by relying on acts immediately surrounding the killing to find that petitioner committed the murder in an especially heinous and depraved manner. Both Ceja, supra, Lujan,

supra, make it clear that the Arizona Supreme Court considers the totality of the circumstances surrounding the actual murder and does consider behavior other than the actual death-producing act. 126 Ariz. at 39-40, 612 P.2d at 495-96; 124 Ariz. at 372, 604 P.2d at 636. Therefore, the particular circumstances of this case, when viewed in light of previous cases involving the finding of "heinous" and "depraved," fully justify the finding of that circumstance.

State v. Johnson, ___ Ariz. ___, 640 P.2d 861 (1982), is easily distinguishable from petitioner's case. The Arizona Supreme Court dealt there, not with a first-degree murder case and the death penalty, but with solicitation to commit murder. Thus, it was obvious that since no murder had been committed, the trial court erred in considering how the murder might have been committed. It is common sense that a court will not consider as aggravation conjectured charactertistics of an unconsummated act. 640 P.2d at 866. That decision lends no support to petitioner's argument since he did murder his former paramour, stabbed two small children, and left them and his own 3-year-old godson in a burning house, telling them to wait for the firemen.

III

THE ARIZONA SUPREME COURT DID NOT REMAND THE CASE BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THE EXISTENCE OF TWO AGGRAVATING CIRCUMSTANCES AND NO MITIGATION SUBSTANTIAL ENOUGH TO WARRANT LENIENCY.

Under Arizona law, if the trial court finds one aggravating circumstance and no mitigation substantial enough to call for leniency, it must impose the death

penalty. Ariz.Rev.Stat.Ann. § 13-703(E). In the case at bar, the Arizona Supreme Court held that the trial court had properly found two aggravating circumstances, and that the mitigation offered by petitioner was not substantial enough to merit leniency. Since both the trial court and the Arizona Supreme Court, in its independent review of the record, determined that there was no mitigation warranting leniency, there was no point in remanding the case. It would have made no difference if the supreme court had agreed with the trial court about only one aggravating circumstance because it is the absence of mitigation that requires the imposition of the death penalty, not multiple aggravating circumstances. Respondent also points out that the Arizona Supreme Court did not "reverse," in the ordinary sense of the word, the trial court's holding with respect to the circumstance in Ariz.Rev.Stat.Ann. § 13-703(F)(6). Although it disagreed with the finding of especially "cruel," it agreed that petitioner committed the offense in an especially heinous and depraved manner. In view of the fact that that particular circumstance is written in the disjunctive, the supreme court upheld the finding of that circumstance, although not the specific element of cruelty. Other states whose statutes also require the imposition of death when there is one aggravating factor and insufficient mitigation have refused to remand the case for resentencing. Francois v. State, supra; Enmund v. State, 399 S.2d 1362 (Fla 1981); State v. Mattheson, 407 S.2d 1150 (La. 1981); State v. Williams, 383 S.2d 369 (La. 1980), cert. denied, 449 U.S. 1103 (1981); State v. Martin, 376 S.2d 300 (La. 1979); cert. denied, 449 U.S. 998 (1980); State v. Goodman, 257 S.E.2d 569 (N.C. 1979).

Respondent is aware that this Court has heard arguments in Zant v. Stephens, 631 F.2d 397 (5th Cir. 1980), cert. granted, No. 81-89. Until that case is decided, however, respondent submits that there is no precedent from this Court necessitating a remand under the circumstances of this case. Moreover, even if the Court should affirm the Fifth Circuit's decision, respondent points out that the trial court, not the jury, determines the aggravation and mitigation in Arizona, and that the particular circumstance about which the Arizona Supreme Court disagreed with the trial court (use of simultaneous conviction -- conspiracy to commit murder -- to aggravate) was a mistake of law, not of fact, and quite different in quality from the matters considered and determined by the Georgia jury in Zant v. Stephens, supra. When there is nothing to balance, due to a lack of mitigation, it is futile to remand the case so long as the trial court has properly found at least one aggravating circumstance.

CONCLUSION

The interpretation of the highest state court about a matter of state law is binding on this Court in the absence of infringement upon the Constitution. Arizona has clearly and repeatedly defined the terms used in Ariz.Rev.Stat.Ann. § 13-703(F)(6). The fact that petitioner does not agree with the legislature's choice to write that circumstance in the disjunctive does not render the statute unconstitutional. Nor does the fact that some (but not all) states have interpreted roughly similar language differently, render Arizona's interpretation impermissible. Arizona has applied its definitions consistently -- regardless of petitioner's dislike for them. Petitioner's case, in which the Arizona Supreme

Court disagreed with the trial court's finding that the offense was committed in an especially cruel mannner, and the other cases respondent has cited, amply demonstrate that the Arizona Supreme Court has assiduously monitored these cases to assure evenhanded application and interpretation of aggravating circumstances. Likewise, there is no basis for the contention that the Arizona Supreme Court does not diligently perform a proportionality review of all death-penalty cases.

Equally lacking in merit are petitioner's assertions that he did not receive adequate notice of the particular circumstances upon which the state would rely to prove aggravation and, especially in view of the fact that he admitted to two doctors that he had beaten his wife and engaged in numerous extramarital affairs, the argument that he was denied a Sixth Amendment right to cross-examine his wife. As respondent has noted, the state offered that testimony, not to establish aggravation, but to rebut mitigation. Petitioner does not argue -- because he could not -- that he could have rebutted his own prior admissions to the doctors.

When there is no balancing to perform, because the defendant has produced no persuasive mitigation, there is no reason to remand a case after the highest appellate court agrees with the trial court that two aggravating circumstances do exist.

Petitioner has not raised a substantial federal question and has not demonstrated infringement of

constitutionally protected rights. Therefore, respondent respectfully requests that the Court deny certiorari.

Respectfully submitted,

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JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

DONALD S. KLEIN
Deputy Public Defender
45 West Pennington, 3rd Floor
Tucson, Arizona 85701
Attorney for PETITIONER

this 13th day of April, 1982.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 13th day of April, 1982.

Elizabeth J. Bender
NOTARY PUBLIC

My Commission Expires:

July 17, 1982

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